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No. 830

In the Supreme Court of the United States

OCTOBER TERM, 1960

DOOLEY BROS., INC., PETITIONER,

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court is reported at 181 F.Supp. 312. The opinion of the Court of Appeals (Pet. 24-31) is reported at 286 F.2d 40.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1960. The petition for a writ of certiorari was filed on March 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether employees who are engaged regularly and substantially in the collection and removal of industrial waste, rubbish and debris from the premises of producers of goods for interstate commerce, as well as other customers, are covered by the Fair Labor Standards Act.

STATUTE INVOLVED

Sections 3(j) and 7(a) of the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060, c. 736, 63 Stat. 910, 29 U.S.C. 201, *et seq.*), are set forth in the Petition, pp. 2-3.

STATEMENT

1. This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin petitioner from violating the overtime and record-keeping requirements of the Act. Petitioner conceded non-compliance with these provisions (R. 11-12), but denied that its employees were subject to the Act. The facts relating to the coverage issue, which were submitted by stipulation or affidavits, are as follows:

Petitioner, a Massachusetts corporation, is engaged in the collection and disposal of rubbish, debris and industrial waste (R. 10). It collects such waste from bid districts under contracts with the City of Boston, and also from federal agencies and industrial concerns which are engaged in commerce or in the production of goods for commerce (R. 9, 10).

Six of petitioner's employees, specified by name, spend an estimated one-fourth to one third of their

working time "regularly and recurrently" making collections from establishments engaged in commerce or in the production of goods for commerce (R. 11, 13); these employees are "engaged in this type of collection for a substantial time each and every day" (R. 13). Some of petitioner's industrial customers contract to have their refuse collected three times a week, and others daily; they consider such frequent collections to be essential to carrying on their businesses (R. 15-27).

The type and quantity of waste collected from these industrial and commercial customers differs from that of ordinary residential trash and garbage. Among petitioner's industrial and commercial customers regularly requiring such waste collection are a sugar refinery, meat processing and packing plants, a candy factory, photo reproduction and engraving plants, electronic equipment processing plants, a stained glass manufacturing plant, and an upholstery and drapery fabric supply company (R. 15-29)—whose waste consists of large quantities—usually numerous barrels in each pick-up—of cinders, refuse, spoiled goods of various kinds, scrap glass, metal chips and shavings, cans, shipping cartons and crates, and miscellaneous rubbish and debris accumulating in the ordinary course of their operations (R. 15-27). Frequent regular waste removal service is essential for such businesses because accumulation of the industrial waste would create fire, health and accident hazards, would violate health regulations, and result in cramped space conditions hampering efficiency and production (R. 17, 19, 20).

2. The district court (Wyzanski, J.) granted petitioner's motion for summary judgment, concluding that, while the work of petitioner's employees was "essential" to the interstate production of its customers (R. 28), it was not "closely related" to that production within the meaning of the 1949 amendment to the Act's definition of "produced".[1] The court of appeals, in an opinion by Judge Aldrich, unanimously reversed.

ARGUMENT

The decision below is correct and in accord with prior rulings of this Court delineating the scope of the Fair Labor Standards Act. There is no conflict with the decision of any other court of appeals, or other reason for further review.

1. The holding of the Court of Appeals is supported by *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, re-affirmed last term in *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310; it correctly applies the principles of the *Zachry* decision and is consistent with that decision and with *10 East 40th Street Bldg., Inc.* v. *Callus*, 325 U.S. 578.

The *Zachry* decision confirmed the continued vitality of the *Kirschbaum* holding "that the jobs of building-maintenance employees, ranging in responsibility from electrician to porter, of a loft building locally owned but tenanted by production facilities of producers for commerce, had 'such a close and immediate

[1] Prior to 1949, "produced" was defined to include "any process or occupation necessary to the production" of goods for commerce. Sec. 3(j), 52 Stat. 1060. The amendment substituted the words "directly essential" for the word "necessary," and inserted the words "closely related" preceding the words "process or occupation." 63 Stat. 911, 29 U.S.C. 203(j).

tie with the process of production for commerce, and [were] therefore so much an essential part of it,' that the employees' occupations were 'necessary' to production" (362 U.S. at 314-315), and of "the governing principle that coverage turns upon the nature of the employees' duties and not upon the nature, local or interstate, of the employer's general business" (*id.* at 315).

On the admitted facts of the present case, the duties of certain of petitioner's employees require that they regularly spend a substantial part of their time performing the essential waste removal function immediately at the premises where the actual production of goods for commerce is taking place. Thus, it is patently distinguishable from the *Callus* case, which involved maintenance employees of an office building where no actual production of goods was carried on (see 325 U.S. at 581). As petitioner itself points out, *Callus* emphasized "the practical differences between buildings tenanted by manufacturers * * * on the one hand, and an office building housing the usual miscellany of offices, on the other" (Pet. p. 6). In declining to extend *Kirschbaum* to cover the *Callus* maintenance employees merely "because some proportion of the offices in the building may, for the time being, be offices of manufacturing enterprises" (*id.* at 583), this Court pointed out that "remoteness of a particular occupation from the physical process [of production] is a relevant factor in drawing the line," and concluded that "[r]unning an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods" (*ibid.*).

This factor of remoteness from the physical process of production also distinguishes the factual situation in *Zachry*, where the construction of a new dam for a municipal water supply system servicing interstate instrumentalities and producers was found to be too remote from the commerce or actual production process. In contrast, the services of petitioner's employees are rendered directly to interstate producers at the very premises where the physical production of goods for commerce takes place.

2. Petitioner's contention that the decision below "misreads" and "nullifies" the intention of Congress in amending Section 3(j) in 1949 is not supported by the legislative history, and indeed is contradicted by those parts of the legislative history on which both the Senate and the House were in agreement. Petitioner relies upon isolated statements made only on the House side or by the minority of the Senate conferees. As pointed out in *Zachry* (362 U.S. at 317, 318), the House and Senate reports "manifest some disagreement as to degree" of intended restraint on coverage and there are some "apparent inconsistencies between the reports." The court below, heeding this Court's admonition that "even were we to accept the illustrations in the House Report as authoritative, we would not be relieved of the duty of deciding where between these boundaries of approval and disapproval the present facts lie" (362 U.S. at 318), quite properly rejected petitioner's "generalizations" predicated on "analogies" to isolated illustrations used by only one branch of Congress (Pet. p. 28).

That the facts of the present case fall within the

"boundaries of approval" of coverage is confirmed by the area of agreement and the illustrations of coverage cited approvingly in both houses of Congress. Thus, it was not only generally agreed that no radical restriction of coverage, as interpreted by the courts in the past, was intended (95 Cong. Rec. 14942, 14874), but it was also specifically agreed that many employees of independent "local service companies," comparable to petitioner's business, would remain within the amended Act's coverage.

The reports of both House and Senate conferees supplemented their general disclaimers of any radical change of coverage with specific illustrations of employees who would "remain subject to the act" as "doing work that is closely related and directly essential to the production of goods for commerce" (House Rept., 95 Cong. Rec. 14929; Senate Rept., 95 Cong. Rec. 14874-75). These illustrations, which both the House and Senate conferees agreed would remain within the Act's coverage, not only are the closest analogies to the facts of the present case, but plainly contradict any inference that there was a generalized intent to exclude activities related to production simply because they are performed by employees of "an independent local service industry" whose "customers include local businesses and private homes as well as enterprises engaged in commerce and in production" (see district court opinion, 181 F.Supp. 312 at 314). Not only was *Kirschbaum* approved by both houses, but "[b]oth reports use as illustrations of coverage which remains unchanged by the amendment, employment in utilities supplying water [or electricity, gas,

fuel, etc.] to the producers of goods for commerce" (*Zachry, supra,* 362 U.S. at 318; 95 Cong. Rec. 14874-14875, 14929).[2]

This specific affirmation by both branches of Congress that maintenance and custodial employees and

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[2] Thus, the House Report stated that:

> * * * the proposed changes are not intended to remove from the act *maintenance, custodial, and clerical employees* of manufacturers, mining companies and other producers of goods for commerce. *Employees engaged in such maintenance, custodial, and clerical work will remain subject to the act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce.* All such employees perform activities that are closely related and directly essential to the production of goods for commerce.
>
> The bill as agreed to in conference also does not affect the coverage under the act of employees who repair or maintain buildings in which goods are produced for commerce (*Kirschbaum* v. *Walling*, 316 U.S. 517) or who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce. *Likewise, employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, producing, or mining goods for commerce, will remain subject to the act.* All the employees mentioned in this paragraph are doing work that is closely related and directly essential to the production of goods for commerce. [95 Cong. Rec. 14928-29; emphasis added.]

The corresponding Senate Report statements are equally explicit, adding citations of the specific court decisions intended to remain unaffected:

> Typical of the classes of employers whose work is closely related and directly essential to production, within the meaning of Section 3(j) as amended by the conference agreement, are the following employees performing tasks necessary to effective productive operations of the producer;
>
> * * * * *
>
> 2. Employees repairing, maintaining, improving, or enlarging

employees of independent public utility companies would remain covered by the amendatory language is sufficient to refute petitioner's contention of a general Congressional intent to exclude from coverage all employees of "local service companies," as such.[3] The typical public utility company is clearly no less a "local

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the buildings, equipment or facilities of producers of goods. [Citing *Kirschbaum* and other decisions.]

3. Plant guards, watchmen, and other employees performing protective or custodial services for producer of goods. [Citing cases.]

The work of such employees is, as a rule, closely related and directly essential to production *whether they are employed by the producer of goods or by someone else* who has undertaken the performance of particular tasks for the producer. [95 Cong. Rec. 14874, 14875; emphasis added.]

The work of employees of employers who *produce or supply goods or facilities for customers engaged within the same State in the production of other goods for interstate commerce* may also be covered as closely related and directly essential to such production. This would be true, for example, of employees engaged in the following activities.

1. Productions of tools, dies, designs, patterns, machinery, machinery parts, mine props, industrial sand, or other equipment used by purchaser in producing goods for interstate commerce. [Citing cases.]

2. *Producing and supplying fuel, power, water, or other goods for customers using such goods in the production of different goods for interstate commerce. Reynolds* v. *Salt River Valley Users Asso.* (143 F.(2d) 863 (C.A. 9)); *Phillips* v. *Meeker Coop. Light and Power Asso.* (158 F.(2d) 698 (C.A. 8)); *Lewis* v. *Florida Light and Power Co.* (154 F.(2d) 751 (C.A. 5)); *West Kentucky Coal Co.* v. *Walling* (153 F.(2d) 152 (C. A. 6)). [95 Cong. Rec. 14875; emphasis added.]

* * * * *

[3] To the extent that Congress had such a general intent, it expressly so provided in the "retail or service establishment" exemptions of Sections 13(a)(2) and 13(a)(4).

service company" serving the "usual miscellany of [customers]" than is petitioner's business.[4] It is equally evident that protecting the premises of producers from fire and health hazards by regular removal of accumulative waste is no less closely related to production than are the custodial duties of outside guards or firemen, which have consistently been held covered by the Act, both before and after the 1949 amendments to Section 3(j).[5]

3. Petitioner contends that the particular occupation of its employees has not previously been the subject of any specific judicial ruling or administrative interpretation. But, as we have shown, the facts of

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[4] It has long been settled by a consistent line of decisions, both before and after the 1949 amendments, that employees of a utility supplying essential fuel, power, water, or the like, to interstate instrumentalities and interstate producers are engaged "in the production of goods for commerce" within the secondary (*ie.*, related-to-production) meaning of Section 3(j). *Meeker Cooperative Light & Power Ass'n.* v. *Phillips*, 158 F.2d 698 (C.A. 8); *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C.A. 10); *Lewis* v. *Florida Power & Light Co.*, 154 F.2d 751 (C.A. 5); *Davila* v. *Porto Rico Ry. Light & Power Co.*, 143 F.2d 236 (C.A. 1); *West Kentucky Coal Co.* v. *Walling*, 153 F.2d 582 (C.A. 6); *Mitchell* v. *Mercer Water Co.*, 208 F.2d 900 (C.A. 3).

This line of decisions was specifically approved by the Senate Report (*see supra*, p. 9).

[5] *Walton* v. *Southern Package Corp.*, 320 U.S. 540; *Armour & Co.* v. *Wantock*, 323 U.S. 126; *Mitchell* v. *Joyce Agency, Inc.*, 348 U.S. 945, affirming *Durkin* v. *Joyce Agency, Inc.*, 110 F.Supp. 918 (N.D. Ill.); *Mitchell* v. *Famous Realty*, 211 F.2d 198 (C.A. 2), certiorari denied, 348 U.S. 823; *General Electric Co.* v. *Porter*, 208 F.2d 805, 811 (C.A. 9), certiorari denied, 347 U.S. 951; *Russell Co.* v. *McComb*, 187 F.2d 524 (C.A. 5); *Walling* v. *Sondock*, 132 F.2d 77 (C.A. 5)

The *Walton*, *Armour* and *Sondock* decisions (which antedated the 1949 amendment) were all specifically approved, by name, in the Senate Report [95 Cong. Rec. 14875].

this case closely parallel many other situations in which coverage has been well established under the guiding principles, established by the decisions of this Court and the Courts of Appeals, and embodied in the Administrator's Interpretative Bulletin.

Contrary to petitioner's assertion, the Court of Appeals undertook a careful analysis of the relationship of the work of petitioner's employees to the production processes. In questioning the accuracy of the comparison made by petitioner between the present facts and those of *Martino* v. *Michigan Window Cleaning Co.*, 327 U.S. 173,[6] the court specifically noted the differences distinguishing the duties of petitioner's employees from those of the window washers in *Martino*. As the opinion points out, there are "many differences between occasionally cleaning a window and the continuous process of removing debris which * * * were necessary to efficient or even lawful carrying on of the interstate business" and such waste removal clearly could not be regarded as nonessential, which

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[6] The *Martino* case was expressly disapproved in the House Report and, as noted in the opinion below (Pet. p. 30, fn. 4), the Secretary has accepted this limitation. *Cf. Mitchell* v. *H. B. Zachry Co.*, *supra*, where respondent argued that coverage of the construction of a dam to augment a municipal water supply system was precluded by the House Report's disapproval of *Schroeder* v. *Clifton*, 153 F.2d 385 (C.A. 10), involving "[e]mployees of a quarry engaged in mining and processing stone for local use in the construction of a dike" (95 Cong. Rec. 14929). Noting that the *Schroeder* case involved an activity "in support of construction of a dam" and "not the construction of the dam itself," the Court held that "even were we to accept the illustrations in the House Report as authoritative, we would not be relieved of the duty of deciding where between these boundaries of approval and disapproval the present facts lie" (362 U.S. at 318).

appears to have been the reason for the House conferees' exclusion of window-washers (Pet. p. 30).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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